

**ORIGINAL**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 97-45
Table of Allotments,	)	RM-8961
FM Broadcast Stations.	)	
(Tylertown, Mississippi)	)	

To: Chief, Allocations Branch

**REPLY TO OPPOSITION**  
**TO PETITION FOR RECONSIDERATION**

Guaranty Broadcasting Corporation ("Guaranty"), by its attorneys and pursuant to Section 1.429(g) of the Commission's rules, hereby replies to the *Opposition to Petition for Reconsideration and Motion for Stay* (the "Opposition") filed on May 8, 1998 by TRL Broadcasting Company ("TRL") in the above-captioned proceeding.

**I. PRELIMINARY STATEMENT**

TRL's Opposition is, at the same time, inapposite and revealing. In one sense, it virtually overflows with extraneous and irrelevant material designed to not only distort the essential facts, but distract the Commission away from the central issues.<sup>1</sup> Guaranty has no intention of responding to such disparate and pointless rhetoric. Rather, this Reply will focus only on the crucial public interest issues that underlie TRL's conduct in this proceeding.

<sup>1</sup> Indeed, TRL's persistent detours down one irrelevant road after another actually caused it to produce a 32-page document that substantially exceeds the authorized page limit established by Section 1.429(f) of the Commission's rules - a remarkable procedural lapse by a party that, at least heretofore, has seemingly preferred to stress procedural detail over substantive merit.

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In another sense, however, TRL's Opposition contains damaging admissions that confirm a deliberate course of action by TRL (and its principal) involving a blatant misuse of this Tylertown rulemaking proceeding in order to gain a private economic advantage in connection with the acquisition of an operating station in another totally separate location. The evidence is compelling. First, there are the signed declarations of four different Guaranty officials who were present at key meetings and attest to certain relevant facts (declarations that are reaffirmed in all respects in this Reply). Second, there is the manifest sequence of dates and activities highlighted by TRL's filing of rulemaking petitions for Tylertown, Mississippi and Amelia, Louisiana and its principal, Roy Henderson, initiating direct contact with Guaranty to secure one of Guaranty's stations. Third, there is the written engineering material that Mr. Henderson prepared in advance and used in meetings with Guaranty to demonstrate the adverse impact his rulemaking proposals would have on Guaranty's interests. And, finally, as detailed below, there is now TRL's May 8 Opposition which not only acknowledges the basic facts but makes damaging concessions as to certain highly relevant matters.

In short, based on this evidence and the clear absence of a bona fide expression of interest, the Allocations Branch must reverse its initial decision in this matter and delete the allotment of FM Channel 297A to Tylertown, Mississippi.

## **II. A SIGNIFICANT PUBLIC INTEREST ISSUE IS RAISED THAT REQUIRES COMMISSION ACTION**

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Guaranty has demonstrated that TRL seriously abused the Commission's processes by initiating and prosecuting this rulemaking proceeding in bad faith. Although TRL contends that the Staff should ignore the showing in Guaranty's Petition because not every detail was presented earlier, there is no defensible basis for doing so. Not only were the basic facts and

questions concerning TRL's conduct first raised in Guaranty's comments in this proceeding, they were addressed by the Allocations Branch in its Report and Order.

In any event, even if the Commission were to determine that the Petition relies on certain facts not previously presented to the Commission, it is respectfully submitted that the public interest requires their consideration at this juncture.<sup>2</sup> It is fundamental Commission policy that any "statement of interest in operating a station made by a party who, in fact, lacks the requisite intent to construct and operate the proposed facility will...be considered a material misrepresentation" within the meaning of the Commission's rules. Amendment of Section 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes, 5 FCC Rcd 3911, 3914 (1990)(hereinafter referred to as "Abuse of Process Order"). As the Petition demonstrates, TRL made a material misrepresentation to the Commission when it requested the initiation of a public allotment proceeding with the avowed purpose of adding new service when its real purpose was achieving a totally different, undisclosed private objective. See 47 C.F.R. § 1.17 (a rule that, inter alia, prohibits the making of any misrepresentation in any affirmative filing with the FCC). As such, the Allocations Branch's allotment of a new channel at Tylertown is inconsistent with the public interest and must be deleted because it is based on an expression of interest which is not bona fide.

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<sup>2</sup> Section 1.429(b)(3) of the Commission's rules specifically states that a petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted if the Commission determines that consideration of the facts relied on is required in the public interest. Certainly facts relevant to the preservation and integrity of the Commission's FM allotment process must fall within this standard.

### **III. TRL'S OPPOSITION CONFIRMS GUARANTY'S SHOWING THAT ROY HENDERSON HAS ABUSED THE COMMISSION'S PROCESSES FOR HIS OWN BENEFIT AND TO GUARANTY'S DETRIMENT**

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As noted, the Commission will allot a new broadcast channel only upon receipt of a bona fide expression of interest. See Santa Isabel, Puerto Rico and Christiansted, Virgin Islands, 3 FCC Rcd 2336 (1988). An expression of interest that is not bona fide is a material misrepresentation to the Commission. Abuse of Process Order at 3914. A material misrepresentation to the Commission is a clear abuse of the agency's processes. Abuse of process involves the use of Commission processes to reach an end that the process was not designed to reach or which undermines the purpose of the process. Policies and Rules Relating to Broadcast Renewal Applicants, 3 FCC Rcd 5179, 5199, n.2 (1988). In finding that an abuse of the Commission's allotment process has occurred, the agency requires "direct evidence of misrepresentation, or evidence of a pattern of filings in which a party expresses an interest in an allotment and either voluntarily dismisses its proposal prior to action in the allotment proceeding or fails to file an application...." Abuse of Process Order, 5 FCC Rcd at 3915.

Guaranty's Petition provides direct evidence of TRL's abuse of the Commission's processes in the form of four sworn declarations from Guaranty's officials.<sup>3</sup> The declarations (including certain maps and materials appended thereto) demonstrate that Roy Henderson used the Commission's allotment process for the sole purpose of gaining a financial advantage in a

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<sup>3</sup> Attached hereto as Exhibit A are new declarations from George A. Foster, Jr.; A. Bridger Eglin; Randy W. Kendrick; and Gregory Herpin, each of which reaffirms in all respects the facts stated in their earlier declarations appended to the Petition.

business deal completely unrelated to the establishment of a new radio station at Tylertown – a result that the allotment process was clearly not intended to achieve.

Although TRL attempts to put its own self-serving “spin” on the facts set forth in Guaranty’s declarations, most of the essential facts are uncontroverted. Indeed, far from rebutting the basic scenario attested to by four Guaranty officials, TRL’s Opposition seems to plainly acknowledge what these declarations prove; namely, that Roy Henderson had a clear master plan that involved using the Tylertown rulemaking proposal as a “stalking horse” for acquiring Guaranty’s KCIL(FM) in Houma, Louisiana.

The sequence of events in Henderson’s master plan to acquire Guaranty’s Houma FM station at a favorable price are as follows:

- (1) In late Summer/early Fall of 1996, Henderson targeted Guaranty’s Houma FM station as a desirable acquisition and contacted Guaranty directly.  
(Opposition at ¶ 8: “In researching the market, Mr. Henderson discovered that KCIL-FM, Houma, Louisiana would be ideal for presenting Spanish language programming in southern Louisiana. Therefore, he contacted Mr. George A. Foster, Jr. for the purpose of discussing a sale of the station.”)
- (2) Henderson met with Guaranty on November 7, 1996 and expressed his desire to buy KCIL.<sup>4</sup>  
(Opposition at ¶ 10: “In November of 1996, Mr. Henderson flew to Baton Rouge to talk with Mr. Foster.”)
- (3) On November 19, 1996, Henderson, through two separate shell companies, filed petitions for rulemaking to allot new FM stations at Tylertown, Mississippi and Amelia, Louisiana.<sup>5</sup>

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<sup>4</sup> Interestingly, TRL’s Opposition does not provide the exact date of the November meeting.

<sup>5</sup> The date that TRL initiated the Tylertown rulemaking proceeding is conveniently omitted from the Opposition.

- (4) On December 10, 1996, Henderson again met with certain Guaranty officials. In anticipation of the meeting, Henderson prepared several engineering studies involving Tylertown and Amelia and Guaranty's FM stations in Hammond, Louisiana and Baker, Louisiana.<sup>6</sup>

(Opposition at ¶ 11: "In anticipation of the meeting, Mr. Henderson had several engineering studies prepared involving the cities of Amelia, Baker, Hammond and Picayune, Mississippi as well as Tylertown, Mississippi. The reason for preparing these studies was to see if Mr. Henderson could help Guaranty in a manner that would be mutually beneficial.")

- (5) At the December 10 meeting, Henderson demonstrated to Guaranty how his Tylertown proposal would block Guaranty's ability to upgrade its Baker station and then stated that he would be willing to withdraw his Tylertown proposal if he could obtain KCIL.

(Opposition at ¶ 14: "Mr. Henderson also showed Mr. Foster that it was possible for Guaranty to upgrade the Baker facility (WTGE-FM). It appeared from Mr. Henderson's research that the only impediments to this upgrade involved: 1) a station in Hammond, Louisiana (WHMD-FM) and 2) the Tylertown, Mississippi rulemaking. Mr. Henderson suggested that if Guaranty was able to get the cooperation of the Hammond station, Mr. Henderson would be willing to withdraw his Tylertown rulemaking as part of an overall deal that would include obtaining KCIL-FM.")<sup>7</sup>

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<sup>6</sup> TRL claims that it prepared these studies and provided them to Guaranty "as a showing of good faith." Opposition at ¶ 11. This is, of course, totally implausible. As TRL readily concedes, Henderson prepared the studies as part of his overall plan to acquire KCIL. That plan involved, according to Henderson, Guaranty's swap of KCIL for the proposed Amelia facility, \$2 million and the withdrawal of the Tylertown rulemaking. See Opposition at ¶¶ 13-14. Thus, Henderson brought the studies to the December 10 meeting to demonstrate the adverse impact that the Tylertown proposal would have on Guaranty's planned upgrade of its Baker FM station. Any suggestion that such written materials were prepared by Henderson solely for Guaranty's benefit and gratuitously supplied to Guaranty simply in order to "help" Guaranty resolve a problem is totally preposterous on its face!

<sup>7</sup> TRL's Opposition states that Henderson did not discover that Guaranty was the licensee of WHMD(FM), Hammond, Louisiana until after he had explained to Guaranty on December 10, 1996, that WHMD and Tylertown were the only things blocking the upgrade of Guaranty's Baker station. Opposition at ¶ 15. This is highly unlikely considering the fact that Guaranty had been the licensee of WHMD since December 6, 1995.

- (6) Henderson met with Guaranty again on March 7, 1997. Guaranty offered a potential sale price of \$6 million for KCIL.  
(Opposition at ¶ 18: "Mr. Henderson understood that the meeting would involve his standing offer to purchase KCIL-FM. Mr. Foster expressed his interest in selling KCIL-FM, Houma, Louisiana for \$6 million.")
- (7) At the March 7 meeting, Henderson again raised the topic of his Amelia and Tylertown rulemaking proposals and indicated his willingness to withdraw the proposals in exchange for KCIL at a price of \$2 million.  
(Opposition at ¶ 20: "As the substantive talks progressed, Mr. Henderson raised the topic of the Amelia and Tylertown rulemaking proceedings.... If Mr. Henderson were able to purchase an existing broadcast property in the relevant market, this would obviate the need to seek an allotment. Mr. Henderson was prepared to make whatever accommodations Guaranty sought in order to obtain a facility capable of bringing Spanish language radio to southern Louisiana.")  
and  
(Opposition at ¶ 68: "If Mr. Henderson were successful in purchasing a station in the market from Guaranty, it would stand to reason that he would withdraw his participation from one or both of the proceedings. He would be changing his means of market entry.")

Even viewed in their most innocent light, the foregoing facts, confirmed by TRL itself, evidence a deliberate plan by Henderson to use the Tylertown rulemaking as a means for acquiring KCIL. The success of this plan, however, required Guaranty to wilt in the face of Henderson's pressure, thereby allowing sufficient time for TRL to withdraw its Tylertown rulemaking petition before the comment deadline of March 31, 1997. The plan failed, of course, when Guaranty refused to sell KCIL in exchange for withdrawal of the Tylertown rulemaking.<sup>8</sup>

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<sup>8</sup> Given these developments, which document a clear abuse of Commission processes, TRL should not be allowed subsequently to repair the damage by promising to file an application for the allotted Tylertown channel. To accept such a meaningless promise in these circumstances would set a standard whereby any type of pre-allotment misconduct could be effectively "forgiven" or "papered-over" by allowing the wrongdoer to file an after-the-fact application for the allotted channel.

It is particularly significant that TRL concedes, almost without reservation, that the Tylertown rulemaking proceeding was used as part of a master plan to negotiate the purchase of KCIL. Apparently, in TRL's view, there is simply nothing wrong with a strategy that directly links the filing of a critical and targeted rulemaking proposal with a direct approach to the broadcaster potentially affected by the rulemaking in an attempt to negotiate a favorable purchase. We trust the Commission would emphatically disagree with this assessment of how its procedures can be so easily manipulated for private gain. Parties should not be allowed to initiate rulemaking proceedings simply to facilitate the simultaneous negotiation of a station purchase in the same location.

Although TRL tries to explain away its misconduct by stating that it was using the Amelia and Tylertown rulemakings and the negotiations with Guaranty simultaneously in an effort to enter the "market," this explanation simply defies common sense. The "market" that Henderson readily acknowledges was the target of his carefully orchestrated activities was southern Louisiana, particularly New Orleans. See Opposition at ¶¶ 7, 11 and 54. A Class A FM station at Tylertown, Mississippi is simply not capable of serving New Orleans or any significant part of that major market. As such, the Tylertown proposal was nothing more than a means for Henderson to gain leverage in his effort to acquire KCIL at a substantially reduced price. Accordingly, Henderson's statement that he was pursuing the Tylertown allotment so as to provide Spanish language programming to southern Louisiana (including New Orleans) only serves to underscore, indeed highlight, the sham nature of the Tylertown proposal.<sup>9</sup>

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<sup>9</sup> Considering TRL's avowed main objective of finding a station to provide Spanish language programming to southern Louisiana, it is especially implausible that TRL would pursue a Class A FM allotment at Tylertown, Mississippi. For instance, according to the 1990

Unable to deny the facts, TRL attempts to sweep them under the rug by claiming that because Henderson's meetings with Guaranty were "off-the-record," the issues raised by Guaranty are somehow outside the scope of issues that are capable of resolution in an allotment proceeding. Opposition at ¶ 29. This rather unique legal theory is, of course, without basis. Acceptance of TRL's flawed theory would result in an entirely new legal standard which would put virtually any activity or conduct relating to one's formal representations to the Commission in an allocations proceeding beyond legitimate examination.

Finally, TRL's argument that the Allocations Branch "has no means for sorting through the factual claims alleged by Guaranty" is also without basis. Opposition at ¶ 26. The matters raised by Guaranty go to the very heart of the allotment process. The Allocations Branch certainly can (and, we would submit, is required to) consider the issue of whether an expression of interest is bona fide and whether an abuse of its processes has occurred. See Bagdad, Arizona, 9 FCC Rcd 70 (1993); Morristown, New York, 5 FCC Rcd 6976 (1990).

\* \* \*

As matters now stand, TRL's bogus Tylertown rulemaking proposal failed to force Guaranty into selling its Houma, Louisiana station but "succeeded" in blocking Guaranty's plans to complete the pending upgrade of its Baker, Louisiana station. This is a perversion of the rulemaking process which should not be tolerated. Accordingly, the specific relief

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(...Continued)

Census, the percentage of Hispanics in the workforce of Walthall County (where Tylertown is located) is a mere 0.3 percent. In other words, TRL sought to use the proposed Tylertown FM allotment to serve a radio market or geographic area that it could not, as a technical matter, even reach, and a specialized audience that did not, as a practical matter, even exist within the anticipated signal range of the proposed station.

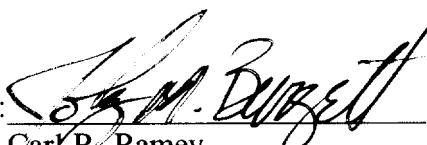
Guaranty seeks is a reversal of the allotment decision that led to this inappropriate result – a form of decision-making clearly within the authority of the Allocations Branch. To the extent that the Commission believes that other actions are warranted to address the issues raised, it can pursue such actions outside the specific allotments context.

#### **IV. CONCLUSION**

TRL's Opposition confirms that the Tylertown proposal was simply part of Roy Henderson's overall plan to acquire Guaranty's KCIL. This is an unmistakable abuse of the Commission's processes. Accordingly, Guaranty respectfully requests that the Allocations Branch reverse its decision allotting Channel 297A to Tylertown and delete the allotment as inconsistent with the public interest.

Respectfully submitted,

**GUARANTY BROADCASTING  
CORPORATION**

By:   
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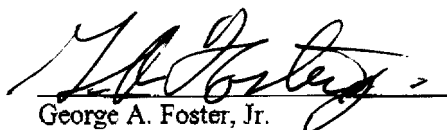
June 4, 1998

EXHIBIT A

**Declaration of George A. Foster, Jr.**

I, George A. Foster, Jr., under penalty of perjury, hereby declare as follows:

1. I have read TRL Broadcasting Company's "Opposition to Petition for Reconsideration and Motion for Stay" dated May 8, 1998 and the declarations of Roy E. Henderson, Ryan E. Henderson and Suzanne Henderson appended thereto.
2. I have reviewed the facts stated in my declaration dated February 9, 1998 and attached as Exhibit B to Guaranty Broadcasting Corporation's "Petition for Reconsideration and Motion for Stay" dated February 25, 1998.
3. Based thereon, I hereby reaffirm my declaration of February 9, 1998 in all respects.

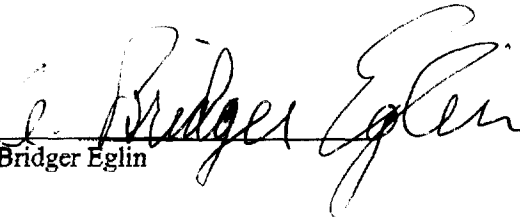
  
George A. Foster, Jr.

Dated: 6/1/98

**Declaration of A. Bridger Eglin**

I, A. Bridger Eglin, under penalty of perjury, hereby declare as follows:

1. I have read TRL Broadcasting Company's "Opposition to Petition for Reconsideration and Motion for Stay" dated May 8, 1998 and the declarations of Roy E. Henderson, Ryan E. Henderson and Suzanne Henderson appended thereto.
2. I have reviewed the facts stated in my declaration dated February 9, 1998 and attached as Exhibit C to Guaranty Broadcasting Corporation's "Petition for Reconsideration and Motion for Stay" dated February 25, 1998.
3. Based thereon, I hereby reaffirm my declaration of February 9, 1998 in all respects.

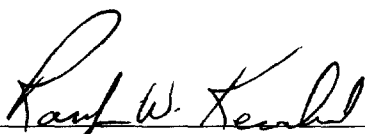
  
A. Bridger Eglin

Dated: 6/1/98

**Declaration of Randy W. Kendrick**

I, Randy W. Kendrick, under penalty of perjury, hereby declare as follows:

1. I have read TRL Broadcasting Company's "Opposition to Petition for Reconsideration and Motion for Stay" dated May 8, 1998 and the declarations of Roy E. Henderson, Ryan E. Henderson and Suzanne Henderson appended thereto.
2. I have reviewed the facts stated in my declaration dated February 9, 1998 and attached as Exhibit D to Guaranty Broadcasting Corporation's "Petition for Reconsideration and Motion for Stay" dated February 25, 1998.
3. Based thereon, I hereby reaffirm my declaration of February 9, 1998 in all respects.

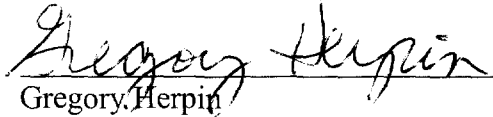
  
\_\_\_\_\_  
Randy W. Kendrick

Dated: 6/1/98

**Declaration of Gregory Herpin**

I, Gregory Herpin, under penalty of perjury, hereby declare as follows:

1. I have read TRL Broadcasting Company's "Opposition to Petition for Reconsideration and Motion for Stay" dated May 8, 1998 and the declarations of Roy E. Henderson, Ryan E. Henderson and Suzanne Henderson appended thereto.
2. I have reviewed the facts stated in my declaration dated February 9, 1998 and attached as Exhibit E to Guaranty Broadcasting Corporation's "Petition for Reconsideration and Motion for Stay" dated February 25, 1998.
3. Based thereon, I hereby reaffirm my declaration of February 9, 1998 in all respects.

  
Gregory Herpin

Dated: 6/1/98

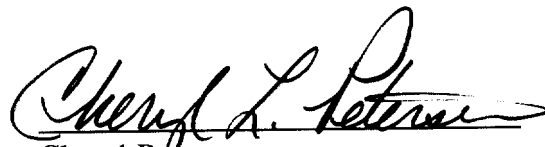
CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 1998, I caused copies of the foregoing  
Reply to Opposition to Petition for Reconsideration to be mailed via first-class postage prepaid  
mail to the following:

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